

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
CC VIII Operating, LLC d/b/a Charter Communications.)	CSR 6138-E
)	
Petition for Determination of Effective Competition in Twelve Michigan Communities)	

MEMORANDUM OPINION AND ORDER

Adopted: March 31, 2004

Released: April 5, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. CC VIII Operating, LLC d/b/a Charter Communications (“Charter”) has filed with the Commission a petition for a determination of effective competition in the twelve Michigan communities listed in Attachment A (the “Communities”) pursuant to Section 623(a) of the Communications Act,¹ and the Commission's implementing rules,² and is therefore exempt from cable rate regulation. More particularly, Charter claims that the presence of effective competition in the Communities stems from the competing services provided by two unaffiliated direct broadcast satellite (“DBS”) providers, DirecTV and EchoStar. Charter claims it is subject to effective competition in these Communities under the “competing provider” effective competition test set forth in Section 623(1)(1)(B) of the Communications Act. The City Manager of the City of Owosso, Michigan (“Owosso”), filed a letter stating opposition to grant of the petition with respect to that community, and Charter filed a reply to that letter.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 623(1) of the Communications Act, and Section 76.905 of the Commission's rules.⁴ The cable operator bears the burden of rebutting the

¹47 U.S.C. § 543(a).

²47 C.F.R. § 76.905(b).

³47 C.F.R. § 76.906.

⁴See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁵ Section 623(l) of the Communications Act provides that a cable operator is subject to effective competition, if either one of four tests for effective competition set forth therein is met.⁶ A finding of effective competition exempts a cable operator from rate regulation and certain other of the Commission's cable regulations.⁷

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁸ Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁹ Charter has provided evidence of the advertising of DBS service in regional and national media serving the franchise areas.¹⁰ Moreover, the two DBS providers' subscriber growth reached approximately 20.4 million as of June 30, 2003, comprising approximately 20 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and EchoStar the fourth largest, MVPD provider as of June 2003.¹¹ We conclude that the population of the Communities at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test. With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer more than 12 channels of video programming, including more than one non-broadcast channel.¹² We further find that Charter has demonstrated that the Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Therefore, the first prong of the competing provider test is satisfied.

4. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Charter has shown that it is the largest MVPD provider in each of these Communities. Charter also provided 2000 Census data showing the number of households for each of the fifteen Communities.¹³ Charter then compared the 2000 Census households for each of the Communities with the households in each of the U.S. Postal Zip Code areas encompassing each Community, and allocated that proportion of

⁵See 47 C.F.R. §§ 76.906 & 907.

⁶See 47 U.S.C. § 543(l)(1)(A)-(D).

⁷See 47 C.F.R. §76.905.

⁸ 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁹See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

¹⁰See Petition at 4-5 and Exhibit 1.

¹¹ *Tenth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 04-5, released January 28, 2004, at Par. 65-67.

¹²See 47 C.F.R. § 76.905(g). *See also* Charter Petition at 4-5 and Exhibit 2 & 3. Exhibits 2 & 3 include channel line-ups for Charter's cable systems serving the Communities as well as those of DirecTV and EchoStar.

¹³*Id.*

the DBS subscribers within each such Zip Code to each Community.¹⁴ The resulting numbers of DBS subscribers were then compared to the household numbers for each Community to demonstrate that in each Community the DBS MPVD providers collectively have attained subscriber penetration levels ranging from 16.20 percent in the Township of Forsyth, Michigan, to 31.80 percent in the City of Tawas City and in the Village of St. Charles, Michigan, or in excess of 15 percent in each of the Communities.¹⁵ Based on this information, we find that Charter has satisfied the second prong of the competing provider test in these twelve Communities.

5. Owosso contends that Charter has failed to show, as claimed, that 17.2% of the households in the City of Owosso are served by a competing provider. We reject this contention and accept Charter's showing that it faces effective competition in Owosso. Although Charter initially submitted data based in part on a Postal Zip Code that does not encompass Owosso, it subsequently submitted data based solely on the Postal Zip Code that does encompass Owosso.¹⁶ The corrected results, showing a competing provider penetration of 16.70 percent in Owosso, is set forth in Attachment A. Based on this data, we find that DBS penetration of Owosso exceeds the 15 percent threshold set forth in the second prong of the competing provider test and that Charter faces effective competition in Owosso.

6. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable systems serving all of the twelve Michigan Communities set forth on Attachment A are subject to effective competition.

III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition in the twelve Michigan Communities set forth on Attachment A filed by CC VIII Operating, LLC d/b/a Charter Communications **IS GRANTED**.

8. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.¹⁷

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

¹⁴ *Id.*

¹⁵ *Id.* at 5-7 and Exhibit 5. The penetration rate for each Community is set forth on Attachment A.

¹⁶ Charter Reply to Unauthorized Response of the City of Owosso, Michigan at 2-3, which is accepted for filing along with the City's letter of May 9, 2003, for purpose of having a more complete record.

¹⁷ 47 C.F.R. § 0.283.

ATTACHMENT A

File No. CSR 6138-E

**MICHIGAN COMMUNITIES SERVED BY
CC VIII Operating, LLC d/b/a Charter Communications**

Competing Provider Test

Communities	2000 Census Households**	Zip Code Households	DBS Subs		DBS Subs Allocated	CPR*
			Alloc	Per Zip Code		
Township of Alabaster	222	2,651	8.40%	669	56	25.20%
Township of Forsyth	2,022	2,898	69.80%	469	327	16.20%
Township of Montrose	2,089	3,160	66.10%	859	568	27.20%
City of Montrose	625	3,160	19.80%	859	170	27.20%
City of Owosso	6,340	12,335	51.40%	2,058	1,058	16.70%
Township of Oxford	5,787	8,553	67.70%	2,364	1,600	27.60%
Village of Oxford	1,402	8,553	16.40%	2,364	388	27.70%
Township of Plainfield	1,897	3,612	52.50%	1,070	562	29.60%
Village of St. Charles	865	2,596	33.30 %	825	275	31.80%
City of St. Ignace	1,085	2,230	48.70%	596	290	26.70%
Township of Swan Creek	957	2,596	36.90%	825	304	31.80%
City of Tawas City	760	2,651	28.70%	669	192	25.30%

*CPR = Percent DBS penetration rates.

**See Charter Petition at Exhibits 4, 5, & 6.